(3)

No. 90-551

In The

Supreme Court of the United States

October Term, 1990

MC EVOY TRAVEL BUREAU, INC.

Petitioner,

v.

HERITAGE TRAVEL, INC.
DONALD R. SOHN
AND
NORTON COMPANY

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION OF NORTON COMPANY, HERITAGE TRAVEL, INC. and DONALD R. SOHN

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QUESTION PRESENTED BY PETITIONER

Are the mail and wire fraud statutes, 18 U.S.C. §§1341, 1343, violated and the standards set forth in *McNally v. United States*, 483 U.S. 350 (1987), satisfied by establishing a defendant's intent to effectuate a "scheme . . . to defraud" in which *one* party is deceived and *another* party deprived of money or property, or must the deceived party lose some money or property?*

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* The Question which Petitioner attempts to present does not reflect the decision of the lower court and is therefore not properly before this Court. (See *infra* at 6-8.) If the Petition is granted, the proper Question is: Whether the court of appeals correctly held that the complaint failed to allege a violation of the Racketeer Influenced Corrupt Organization Act because in failing to allege that the defendants engaged in a scheme to defraud anyone of property or money, the complaint failed to allege any predicate acts violative of the mail and wire fraud statutes, 18 U.S.C. Section 1341 and 18 U.S.C Section 1343.

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STATEMENT OF THE CASE

This case is an ill-advised effort by Petitioner to bring a claim for damages in federal court under a federal cause of action after successfully obtaining $600,000 in damages from a state court for essentially the same injury. (App. 5.) The courts of the First Circuit rejected Petitioner's efforts, as have other federal courts faced with similar duplicative claims. See e.g., *Mortell v. Mortell, Inc.*, 887 F.2d 1322 (7th Cir. 1989); *Jae-Soo Yang Kim v. Pereira Enterprises, Inc.*, 694 F. Supp. 200 (E.D. La. 1988); aff'd, 873 F.2d 295 (5th Cir. 1989); *Cullen v. Paine Webber Corp.*, 689 F. Supp. 269 (S.D.N.Y. 1988); *Cuban v. Kapoor Bros., Inc.*, 653 F. Supp. 1025 (E.D.N.Y. 1986); *Luebke v. Marine National Bank of Neenan*, 567 F. Supp. 1460 (E.D. Wisc. 1983).

Petitioner, McEvoy Travel Bureau, Inc. (hereinafter "McEvoy" or "Petitioner") brought this complaint in the United States District Court for the District of Massachusetts exclusively under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961, et seq., ("RICO"), against Norton Company ("Norton"), Heritage Travel, Inc. ("Heritage") and the President of Heritage, Donald R. Sohn ("Sohn"). (App. 2.)[1] Essentially, the complaint alleged that McEvoy was injured when its contract to provide Norton with travel services was terminated in May 1983. McEvoy alleged that this injury was caused by Respondents' violation of the RICO statute. (App. 5.)

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[1] In this Opposition, references to the separate Appendix filed by Petitioner are preceded by App.; references to the Petition are preceded by Pet.

This is the second lawsuit brought by McEvoy against Norton arising out of Norton's termination of McEvoy as its corporate travel agent. (App. 4-5.) In 1983, McEvoy brought suit against Norton in the state courts of Massachusetts alleging that Norton's termination of McEvoy constituted a breach of contract, an act of deceit and an unfair or deceptive act or practice in violation of Massachusetts General Laws Chapter 93A. (App. 4.) In that case, judgment was entered for Norton on the breach of contract count and against Norton on the deceit and unfair or deceptive practice counts. *Id.* Thereafter, on December 2, 1988, five years after initiating its claim in state court, McEvoy brought this action, articulating a different legal theory for the same alleged injury – damages arising from the termination of McEvoy's contract with Norton. (App. 5; Pet. 11.)

On September 25, 1989, the district court dismissed plaintiff's complaint, with prejudice, characterizing the complaint as a "specious polemic" (App. 31) and concluding that plaintiff had, among other things, failed to allege a "pattern of racketeering activity" as required by the RICO statute. (App. 30.) On appeal, the United States Court of Appeals for the First Circuit affirmed the district court's decision, also finding that the complaint failed to state a claim upon which relief could be granted. (App. 24.)[2]

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[2] Petitioner argues that because the court of appeals affirmed dismissal of the complaint on grounds not articulated by the district court, it must have found the district court's

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The court of appeals found that plaintiff had failed to allege the necessary predicate acts of mail or wire fraud required to state a claim under the RICO statute because the plaintiff's complaint failed to allege that the defendants had engaged in a scheme to defraud anyone of property or money within the meaning of the mail and wire fraud statutes.[3] (App. 11-12.) The court reviewed Petitioner's complaint and found that the complaint alleged three (3) separate schemes to defraud, purportedly in violation of the mail and wire fraud statutes. (App. 14.) The first alleged scheme consisted of Norton and Heritage's activities in carrying out the provisions of an allegedly "illegal contract" between them for the provision of travel services.[4] The second scheme involved

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reasons to be improper. (Pet., 12.) This position is meritless. Simply because the court of appeals did not address the district court's grounds and instead found alternative grounds to sustain dismissal of the complaint does not mean that the court of appeals recognized implicitly or otherwise that the district court was wrong.

[3] Petitioner maintains that the court of appeals implicitly found that the only defect in the RICO claim was a failure to properly alleged acts of mail or wire fraud. The court made no such finding. In fact, there were numerous defects in plaintiff's substantive RICO claim. In addition to failing to allege indictable mail or wire fraud, Petitioner failed to allege a "pattern of racketeering activity" (App. 30), the requisite causation, and that Norton "conducted" Heritage in violation of the RICO statute.

[4] The Norton/Heritage contract was not illegal. No court has so found, and as fully briefed to the district court and the court of appeals, the contract between Norton and Heritage was not in any way illegal or violative of any rule or regulation. Petitioner's assertions to the contrary are simply untrue.

alleged actions taken by Norton and Heritage in submitting what McEvoy characterizes as a "phony" contract to the Air Traffic Conference ("ATC") and the International Air Transport Association ("IATA") to secure approval of the Norton/Heritage contract.[5] The third alleged scheme consisted of purported "kickbacks" between Heritage and American Airlines. (App. 14-15.)

Because a "scheme" under the mail and wire fraud statute requires an intent to deceive another by means of false or fraudulent pretenses, and because neither the first nor third schemes, (the activities pursuant to the Norton/Heritage contract and the "kickback" scheme involving American Airlines), were even arguably intended to deceive anyone, the court of appeals held that neither of these schemes were within the scope of the mail and wire fraud statutes. (App. 16-18.) Petitioner does not challenge the court of appeal's holding in this regard. (Pet., 10.)

In examining the alleged scheme based on the submission of the "phony" contract to the ATC and IATA, the lower court assumed for the purpose of its decision that Respondents did devise a scheme to defraud the ATC and the IATA in order to obtain approval of their contract. (App. 18.) The court of appeals nevertheless found that the complaint failed to allege the requisite intent to deprive someone of property because the alleged scheme only sought to induce official action by the ATC-IATA.

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[5] In its complaint, McEvoy alleged that Norton and Heritage were legally required to obtain approval of the ATC and IATA in order to complete their contractual relationship. Respondents deny there is any such legal requirement.

(App. 11-12.) The court of appeals held that under the plain language of the mail fraud statute, as well as this Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987), the scheme alleged would not be violative of the mail fraud statute as it existed at the time of the alleged conduct[6] because the scheme was not intended to deprive anyone of property. (App. 11-12.) Since no violation of the mail fraud statute was alleged, the complaint failed to allege a violation of the RICO statute.[7]

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[6] The statute has since been amended at 18 U.S.C. Section 1346. (App. 13.)

[7] In addition to the grounds relied upon by the lower courts, there are numerous other grounds requiring dismissal of the complaint. These include res judicata and statute of limitations. Specifically, the prior state court judgment barred McEvoy from bringing another action based upon the same wrongdoing and injury. See *Mortell v. Mortell Company*, 887 F.2d 1322 (7th Cir. 1989). In addition, plaintiff's complaint was brought more than 4 years after plaintiff's cause of action accrued upon McEvoy's termination by Norton in June of 1983, and was thus precluded by the applicable statute of limitations. See *Agency Holding Company v. Malley-Duff and Associates, Inc.*, 483 U.S. 143 (1987).

ARGUMENT

A. The Question Presented Does Not Reflect The Lower Court's Decision And Is Therefore Not Properly Before This Court.

Norton, Heritage and Sohn oppose the Petition for a Writ of Certiorari on the grounds that the decisions of the lower courts are correct and there are no special or important reasons justifying further review. (Rule 10.)

The Question Presented by Petitioner was not addressed or decided by the lower court. The court of appeals did not decide, contrary to Petitioner's contention, that the intended victim of a scheme to defraud must be directly deceived by the defendant. The court of appeals decided only that the facts set forth in the complaint failed to allege a scheme to defraud *anyone* of property. (App. 11-12.) "[W]e conclude that as a matter of law the allegations fail to show that the appellees engaged in a scheme to defraud anyone of property or money within the meaning of the mail and wire fraud statute." (App. 11-12.) The court of appeals reached this conclusion because the complaint failed to allege that the defendants intended to deprive the parties they intended to deceive (ATC and IATA) of property or money. Thus, under *McNally* and *Carpenter* and the mail fraud statute as then written, plaintiff failed to allege mail or wire fraud.

The court of appeals' analysis fully supports the holding that there was no scheme to defraud anyone of property or money. First, a "scheme" must be intended to deceive another by deceptive conduct. (App. 16.) Here, there were three "schemes" alleged in the complaint. Two

of the schemes, the activities pursuant to the alleged "illegal contract" and the "kickback" scheme involving American Airlines, were undisputedly not intended to and did not deceive anyone. (App. 17-18.)

Only the second alleged scheme, the effort to have the allegedly "illegal contract" approved by the ATC and IATA, was arguably a scheme to defraud anyone. However, as the lower court decided (App. 22), this alleged scheme to defraud was allegedly intended to obtain only favorable government action from the ATC and the IATA, not property or money.[8]

The court of appeals also found that the alleged scheme to defraud the ATC-IATA was not intended to deprive McEvoy of property. (App. 20-22.) The holding of the court of appeals is fully consistent with this Court's holding in *Sedima, S.P.R.L. v. Imrex, Co., Inc.*, 473 U.S. 479, 496-497 (1985) and with decisions following *Sedima* which recognized the requirement of a direct causal link between the mail fraud or the wire fraud, and the alleged harm. The courts of appeal have often discussed the causation requirement in terms of standing and have ruled that in order to have the requisite standing, a RICO plaintiff must show that it was the "victim" or "target" of the predicate acts, or that the injury was proximately caused by reason of a violation of 18 U.S.C. §1962. See *Nodine v. Textron, Inc.*, 819 F.2d 347, 348 (1st Cir. 1987)

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[8] This alleged scheme to defraud the ATC/IATA was not intended to deprive McEvoy of property. (App. 20.) Moreover, even assuming McEvoy lost property or money, McEvoy's loss was not alleged to have been caused by the alleged scheme to defraud the agencies.

(standing requirement has two parts, (i) that there be a violation of §1962, and (ii) that the violation caused the injury); *Pujol v. Shearson/American Express, Inc.*, 829 F.2d 1201, 1205 (1st Cir. 1987) (same); see also *O'Malley v. O'Neill*, 887 F.2d 1557, 1561-1563 (11th Cir. 1989); *Brandenburg v. Seidel*, 859 F.2d 1179, 1187 (4th Cir. 1988).

In sum, because there was no relationship, causal or otherwise, between McEvoy's loss of the Norton contract and the alleged scheme to approve the Heritage contract,[9] the court of appeals found that there was no scheme to deprive anyone of property or money. (App. 20-22.) Such a holding is not the same as saying that in all cases the deceived party must also be the injured party. Rather, the First Circuit was merely reaffirming well established principles of standing and causation as they apply to civil RICO actions. Thus, the Question Presented by Petitioner is not before the Court.

B. There Is No Conflict In The Circuits On The Question Presented.

Even if the Question Presented accurately reflected the decision of the lower court, Petitioner is incorrect in its claims that there is a conflict in the circuits on the subject matter. Not one of the cases cited in the Petition as support for the alleged conflict in the circuits supports the proposition that a violation of the mail fraud statute

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[9] McEvoy's contract with Norton had been terminated months before the mailings in question. (App. 21.) Moreover, as decided by the prior state court case, Norton had an absolute right to terminate the contract. (App. 20.)

can be established where the deceived party is different than the injured party. Petitioner directly misstates the holding of some of the cited cases and attributes to others implications ranging far beyond their holdings or rationale.

Petitioner cites both *post-McNally* and *pre-McNally* cases from other circuits and two decisions of the First Circuit Court of Appeals as conflicting with the lower court's decision. None of these cases even address the Question Presented, much less hold contrary to the lower court here.

Not one of the *post-McNally* cases cited holds that a scheme to defraud one party of money or property by deceiving another party states a claim under the mail or wire fraud statutes. Rather, in each of the cited cases, the injured party was also the party deceived. See *Lomelo v. United States*, 891 F.2d 1512, 1517 (11th Cir. 1990) (city was both defrauded party *and* party who lost money); *United States v. Piccolo*, 835 F.2d 517, 518 (3rd Cir. 1987), cert. denied, 486 U.S. 1032 (1988) (general contractor was intended victim and deceived party); *United States v. Consentino*, 869 F.2d 301, 302-07 (7th Cir.), cert. denied, 109 S.Ct. 3220 (1989) (insurance agency was both defrauded party and injured party); *United States v. Olatunji*, 872 F.2d 1161, 1167 (3rd Cir. 1989) (DOE was both deceived party and injured party); *United States v. Keane*, 852 F.2d 199, 205 (7th Cir. 1988), cert. denied, 109 S. Ct. 2109 (1989) (Chicago was defrauded and deprived of confidential information); *United States v. Matt*, 838 F.2d 1356, 1358 (5th Cir.), cert. denied, 486 U.S. 1035 (1988) (defendant's employer was both victim and defrauded party). Thus, none of these cases required the court to even consider

the question Petitioner presents, much less decide it contrary to the lower court's holding.

The three *pre-McNally* cases cited by Petitioner are also inapposite to the Question Presented, and, because they pre-date *McNally* and *Carpenter*, their relevance to the question of inter-circuit conflict is questionable. None of the cases held that the mail or wire fraud statutes include a scheme to deprive one party of money or property by deceiving an entirely different party. Indeed, the intended victim in each case was in fact the deceived party. See *United States v. Venneri*, 736 F.2d 995, 996 (4th Cir.), cert. denied, 469 U.S. 1035 (1984) (scheme was intended to deceive injured party; i.e. defendant's competitors); *United States v. Foshee*, 606 F.2d 111 (5th Cir. 1979), cert. denied, 444 U.S. 1082 (1980) (banks in check writing scam were both victim and party deceived; see prior decision, 569 F.2d 401, 402); *United States v. O'Malley*, 535 F.2d 589 (10th Cir.), cert. denied, 429 U.S. 960 (1976) (scheme to deceive and deprive Mathey-Bishop of money or property). Moreover, the courts in some of these cases merely held that the intended victims need not actually lose money or property. See *United States v. O'Malley, supra; United States v. Foshee*, 606 F.2d 111 (5th Cir. 1979). Thus, Petitioner has failed to cite one case holding contrary to the lower court here.

Petitioner also alleges that there are intra-circuit conflicts within the First Circuit on this issue. However, the two cases cited, *United States v. Allard*, 864 F.2d 248 (1st Cir. 1989) and *United States v. Ochs*, 842 F.2d 515 (1st Cir. 1988), contradict Petitioner's position. In *Allard* the court specifically found that a defrauded entity, the Worcester City Hospital, was in fact the party deceived *and* injured.

864 F.2d at 250-61. *Ochs* merely reflects *McNally* and says absolutely nothing about whether the intended victim can be different then the deceived party.[10]

Thus, contrary to Petitioner's assertion, the decision of the court of appeals does not conflict with the decision of any other United States Court of Appeals on the same matter. The decision of the lower court is entirely consistent with long-established precedent, including recent decisions on the subject matter by this Court. See *McNally v. United States*, 483 U.S. 350, 358-59 (1987); *Carpenter v. United States*, 484 U.S. 19, 27 (1987). Further, none of the cases cited by the Petition even involve the Question Presented, much less hold contrary to the lower court's decision here. Because the sole basis of the Petition is that there is a conflict in the circuits, and because there is no support for this position, the Petition should be denied.

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[10] Petitioner also implies that there are intra-circuit conflicts in the Ninth Circuit. (Pet. 21.) However, like every other case cited by Petitioner, the cases relied upon are inapposite. See *United States v. Egan*, 860 F.2d 904, 909 (9th Cir. 1988) (defendant deceived and deprived his employer of money); *Schreiber Distributing v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986) (appliance supplier was both deceived and deprived of property).

CONCLUSION

For the above stated reasons, Respondents Norton Company, Heritage Travel, Inc. and Donald Sohn respectfully submit that the Petition for a Writ of Certiorari should be denied.

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